1979

Veneta Jesperson v. William Leroy Jesperson, Sr. : Appellant's Reply Brief

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

VENETA JESPERSON,	*	
Plaintiff and Respondent,	*	
vs.	*	No. 16413
WILLIAM LeROY JESPERSON, SR.,	*	
Defendant and Appellant.	*	

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the 5th
District Court for Washington County,
Hon. Robert F. Owens, District Judge Pro Tem

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REPLY TO RESPONDENT'S BRIEF

Respondent in her brief on appeal has resorted to misleading statements and innuendo rather than presenting an argument based on factual statements. Even the purported "Statement Of Facts" is erroneous and not supported by the record.

An occasional harmless error in the brief can be overlooked as simply an innocent mistake. However, when the inaccurate statements are material and important to the equitable resolution of this property settlement they can only have the purpose of misleading the Supreme Court as to the true facts and the status of the evidence.

For example, on page 3 of Respondent's "Statement Of Facts" the statement is made that "the court distributed the property of the marriage 77% to the Plaintiff and 23% to the Defendant." This statement is false and misleading and the Respondent's counsel either knows it is false or he has not read Appellant's brief and cannot understand simple arithmetic. The trial court awarded the furniture and automobile to the Respondent (Tr. P290, LL14-20) and Respondent herself valued these items at $2,000.00 and $3,000.00, respectively (Plaintiff's Full Disclosure Financial Declaration, page 2). In paragraph 3 of the trial court's FINDINGS Respondent was awarded the first $19,027.00 of the $27,000.00 sales price

from the sale of the parties St. George home, leaving a balan of $7,973.00 to be distributed. It was only that portion of the $7,973.00 remaining after costs of sale had been deducted that the trial court awarded 77% to Respondent and 23% to Appellant. The costs of sale totaled $1,802.67, leaving only $6,170.33 to be distributed 77% and 23%. Of course, 23% of $6,170.33 is only $1,419.18, not $6,945.39 which is 23% of the $30,197.33, which is the total property of the marriage (see page 8 of Appellant's brief). Appellant's $1,419.18 amounts to only 4.7% of the property of the marriage and Appellant's share would be even less if we took into account the savings and certificates of deposit (amounts unknown) that were also awarded to Respondent (Tr. P290, LL21-25).

Appellant's counsel is disturbed that Respondent would misrepresent the property division actually made by the trial court. Pages 3 and 8 of Appellant's brief clearly and accurately show that Appellant received only 4.7% of the $30,197.33 marital estate, not counting savings and certificate of deposit of uncertain amounts that were also awarded to Respondent. Yet Respondent persists throughout her brief in claiming that Appellant received 23% of the property. For example, page 9 of Respondent's brief states "The trial court distributed the property 77% to the Plaintiff-Respondent and 23% to the Defendant-Appellant." Then on page 19 the first sentence of Respondent's conclusion states "Plaintiff-Respond respectfully submits that the trial court's award of 77% to

the Plaintiff-Respondent and 23% to the Defendant-Appellant of the marital estates was proper and clearly within the discretion of the court." This sentence would be somewhat truthful if the word "deceitfully" were substituted for the word "respectfully". After making that false statement the Respondent has the barefaced audacity in the very next sentence of the conclusion to suggest that Appellant's brief is based on "assumptions" without having pointed out a single assumption or unsupportable fact that has been relied upon in Appellant's brief.

On the contrary, Appellant's brief is based upon the record and quotes extensively from the transcript, largely from Respondent's own testimony. The only fact or figure used in Appellant's brief that is not in the record is the $1,802.67 costs of sale of the St. George home. That figure was not known at the time of trial but both parties signed a closing statement which disclosed the actual amount of the costs of sale to be $1,802.67 and counsel for both parties received a copy of that closing statement. In the last paragraph of his FINDINGS the trial judge estimated that the costs of sale would be $2,000.00. Respondent has not disputed the accuracy of the $1,802.67 figure and it should therefore stand. Incidentally, had the costs of sale actually been $2,000.00 the Appellant would have received an even smaller property settlement, both in dollar amount and percentage of the marital estate, making Appellant's share even less than 4.7%.

Respondent's brief relies heavily upon innuendo and half-truths which characterize the Appellant as a veritable blackguard living off Respondent as a parasite. The brief dwells at length and places unwarranted emphasis upon Appellant's conduct in leaving Respondent several times during the marriage and on Appellant's "gambling habit" in order to justify the trial court's lopsided award to Respondent. In a marriage "it is seldom, perhaps never, that there is any wholly guilty or wholly innocent party" and that:

> "We recognize that there is no authority in our law for administering punitive measures in a divorce judgment, and that to do so would be improper ..." Wilson v. Wilson 5 Utah 2d 79, 296 P.2d 977 (1956).

Appellant testified that he left Respondent because of her sarcastic nature and because of family disagreements that occurred on some 10 trips to Alpine, Texas to visit Respondent's family (Tr. P158, LL15-22). Respondent apparently enjoyed his companionship or the security his presence provided inasmuch as she accepted him back every time except the last. References to Appellant's gambling in Respondent's brief has been blown totally out of proportion. A reading of the transcript shows that both of them went to Las Vegas and enjoyed gambling. It was nothing more than a recreational activity for them. It is apparent that the trial court, as has counsel in his brief, been excessively influenced by Respondent's accusations and recriminations against Appellant.

Respondent would have the court send Appellant out of the marriage with an old suitcase and a few old clothes

and asks the court to ignor the substantial value of Appellant's work on three different homes. Respondent claims that by so doing Appellant would be no worse off than he was prior to the marriage. This is not true because Appellant is now six years older and he could have been gainfully employed during the years he spent fixing up their three homes. Further, Respondent's argument ignors the real question that must be answered in divorce property settlements. That question is- "How can the property be divided to enable both parties to continue their lives in a happy and useful manner." This has been the consistent theme of nearly all Supreme Court decisions on property settlement questions for the last 20 years or more.

How could the Appellant possibly pursue his life in a happy and useful manner under the judgment of the trial court? By taking his old suitcase held together with a rope and joining the hobo circuit?! Meanwhile, Respondent takes all the property to Alpine, Texas to live near her daughter who owns a shopping center. How can the Appellant be "maintained" as required by Section 30-3-5(1), Utah Code Annotated, 1953, as amended, in the situation in which he has been placed by the trial court? The court in Martinett v. Martinett 8 Utah 2d 202, 331 P.2d 821 (1958) made a pertinent statement in regard to this statute on page 823 when it said:

> "It is important to note that this statute makes no distinction between the spouses. It does not contemplate, nor should there be, any discrimination or inequality in such awards on the basis of sex.

> They may be made in favor of either spouse, and should be based upon the needs of the parties and the equities of the situation being dealt with."

Perhaps Appellant should be awarded alimony to help meet his needs for future maintenance. At the very least an adjustment of the completely lopsided property settlement is in order.

Respondent's brief apparently attempts to mislead the Supreme Court by making several references as to how the trial court applied the rules of law found in the case of Read v. Read, 594 P.2d 871, Utah, (1979). Respondent's brief states, on page 9, that "In light of all the facts the trial court clearly followed the guidance provided in the recent case of Read v. Read ..." and on page 10 that "It would appear that the trial court was very cautious to properly apply the rule of Read v. Read Supra." The trial judge in the Read case was the same judge who heard this case. The FINDINGS in this case were made March 2, 1979 while the Supreme Court decision in the Read case was not filed until April 4, 1979, a month later. Therefore, it would have been impossible for the trial judge to have considered the Supreme Court's opinion in the Read case as the Respondent's brief implies. The trial judge's findings in this case are ample evidence that he was again punishing the party he found "was guilty of gross and repeated marital misconduct" by awarding nearly all the property to the Respondent. The trial judge apparently made these findings without knowledge that his decision in Read had been remanded for modifications.

Respondent's brief also misleads the court when it states on page 6 that Respondent's separate property was needed to pay for the improvements made to the three homes and is again misleading when it states on page 13 that Respondent funded all improvements to the homes. Appellant's brief shows, on pages 14 to 17, that Respondent's claims are unsupported by the record. The parties received more than enough money from the sales of their homes to recover the original cost and to pay for all the improvements. In fact, there was enough money to reimburse Appellant for the value of his labor ($4,970.00) with an overall profit of $1,819.23 still remaining. Thus, the parties were able to meet their ordinary living expenses with their joint social security incomes. The improvements made on the Roswell and St. George homes were paid for through joint checking accounts to which both parties deposited their monthly income (Tr. PP127-128, Tr. P136, LL3, 8-13, and Tr. P186, LL7-13). The accounting below proves from the record that the parties received enough money from the sales of their three homes to recover the original cost of each, to pay for all improvements, and to pay Appellant for the reasonable value of his labor with a profit of $1,819.23 remaining.

Sales Price-Ruidoso (Tr. P92, L15)	$24,500.00
Sales Price-Roswell (Exhibit 5)	25,000.00
Sales Price-St. George (Tr. P109, L22)	27,000.00
Total Received	$76,500.00

Less: Closing Costs		
Ruidoso (Tr. P155, LL6-11)	$ NONE	
Roswell (Exhibit 5)	1,894.11	
St. George	1,802.67	$ 3,696.78
Net Proceeds Received		$72,803.22
Less: Original Costs		
Ruidoso (Tr. P38, LL4-9)	$17,500.00	
Roswell (Tr. P47, LL24-25)	17,500.00	
St. George (Tr. P101, L24)	19,027.50	54,027.50
Remaining for Improvements		$18,775.72
Less: Improvements		
Ruidoso (Tr. P44, LL6-7, 25)	$ 1,050.00	
Roswell (Tr. PP49-50)	4,870.10	
St. George (Tr. P53)	6,958.39	
Add back Refrigerator Respondent still has (Tr. P261, L23)	(892.00)	11,986.49
Remaining for Appellant's Labor		$ 6,789.23
Less: Appellant's Labor		
Ruidoso (Tr. PP169-174)	$ 2,120.00	
Roswell (Tr. PP176-180)	750.00	
St. George (FINDINGS of trial court)	2,100.00	4,970.00
Overall Profit On Three Homes		$ 1,819.23

Even if it is assumed that all improvements were paid from Respondent's separate funds (an assumption, incidentally that would be contrary to the evidence at trial) and that she should be reimbursed for them, there would still be enough to pay Appellant the $4,970.00 for his six years of work, leaving the profit of $1,819.23 to be divided. That Appellant's work increased the value of their homes cannot be denied (Tr. P85, L11), especially in view of the fact that two of the homes were mobile homes which ordinarily

decline in value rather than appreciate. Respondent's brief on page 14 implies that Appellant, through his improvements to their homes, did not provide any specialized skills despite the fact that Appellant had been a contractor (Tr. P201, LL11-22) because of Appellant's age and retired status. To deny that Appellant has made contributions simply because he has been retired for a few years is patently absurd. It is well known that senior citizens can and do make significant contributions in nearly every field of endeavor.

All of this is to say that Respondent has attempted to reconstruct the record in self-serving ways to attempt to cloud the fact that the award of the trial court was indeed inequitable and unreasonable. Whether Respondent likes it or not, the record and the record only, can be used to evaluate the case, not what one would like to have had the record show!

Respondent argues that Appellant has the burden to show an abuse of discretion and cites a few cases stating that the trial court has wide discretion. This, of course, is true - the trial court has wide discretion - but one might ask, how else can one show an abuse of that discretion other than to show that the distribution was not in the general range of 1/3 to the wife and 2/3 to the husband as is often the case, or that it was not one-half to each which is sometimes done, but that the award of the trial court was 95.3% to Respondent and only 4.7% to Appellant! That award was made

in the face of evidence that Appellant was living with a widowed daughter in an apartment while Respondent was living in her own home near her daughter who owns a large shopping center (Page 5 of Appellant's brief).

CONCLUSION

Appellant in his brief has shown that the trial court's findings were not, in fact, supported by the evidence. Although the trial court recognized the value of Appellant's work on the last home there is no explanation why the trial court ignored the value of Appellant's work on the first two homes.

The Appellant's brief shows on page 18 that, as a bare minimum, Appellant is entitled to an award of $5,879.61. The Supreme Court, however, should not ignor the actual conduct of the parties through the eight transactions listed on pages 22 and 23 of Appellant's brief, all of which are well documented by the evidence produced at trial and which demonstrate that Respondent made a gift to Appellant, which was reaffirmed several times, of one-half their real property. This court should not allow Respondent to revoke her gift through this divorce.

In any event, however, the award of the court below should be modified to reflect justice and equity and not serve as a vehicle to punish Appellant for the breakup of

their marriage as was obviously the only explicable reason for the award that was made by the court below.

The Appellant respectfully submits that even though trial courts are given wide latitude, this is a case in which this court should exercise its supervisory function to prevent the imposition of a grave injustice and a serious abuse of discretion against the Appellant.

DATED this 6TH day of November, 1979.

Respectfully submitted,

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